Supreme Court, U.S.
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No. 04-660

IN THE

Supreme Court of the United States

BEN B. FLOYD, Trustee,

Petitioner,

v.

ASHLEIGH NICOLE LUCAS; CRYSTAL ANNA LUCAS; BRANDY MARIE LUCAS; STEPHEN WADE LUCAS, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LADAWN H. CONWAY
MUNSCH HARDT KOPF & HARR, P.C.
1445 Ross Avenue
Suite 4000
Dallas, TX 75202-2790
(214) 855-7500

RHONDA R. CHANDLER*
MUNSCH HARDT KOPF & HARR, P.C.
700 Louisiana
Suite 4600
Houston, TX 77002-2732
(713) 222-1470

Attorneys for Petitioner

* *Counsel of Record*

190782

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether an heir's power under state law to accept an inheritance or to disclaim and channel it to a close family member constitutes "an interest in property" within the meaning of 11 U.S.C. § 548, subjecting a disclaimer of the inheritance within one year of bankruptcy to avoidance by a federal bankruptcy trustee.

2. Whether the state law doctrine of relation-back can modify a substantive federal statute.

LIST OF PARTIES

Petitioner Ben B. Floyd, Trustee, was plaintiff in the bankruptcy court and appellant in the district court and court of appeals. Respondents Ashleigh Nicole Lucas, Crystal Anna Lucas, Brandy Marie Lucas and Stephen Wade Lucas, Jr. were defendants in the bankruptcy court and appellees in the district court and court of appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. The Fifth Circuit affirmed the unpublished opinion of the United States District Court for the Southern District of Texas, which affirmed the decision of the United States Bankruptcy Court for the Southern District of Texas, Houston Division, granting the respondents' motion to dismiss the petitioner's adversary proceeding against respondents. *See* Appendices A-C.

STATEMENT OF JURISDICTION

The Fifth Circuit's opinion was rendered August 11, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 548(a)(1).

Fraudulent transfers and obligations.

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> > (A) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the

date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

The following additional statutory provisions are set out in Appendix D, pursuant to Supreme Court Rule 14.1(f).

11 U.S.C. § 548(d)(1)

11 U.S.C. § 101(54)

COLO. REV. STAT. ANN. § 15-10-301(1)(b) (West Supp. 2003)

COLO. REV. STAT. ANN. § 15-11-801(1), (2)(d), (4)(a) (West Supp. 2003)

COLO. REV. STAT. ANN. § 15-12-101 (West 1997)

TEX. PROB. CODE ANN. § 37 (Vernon 2003)

TEX. PROB. CODE ANN. § 37A (Vernon 2003) (relevant excerpt)

STATEMENT OF THE CASE

1. On January 22, 1996, Irby Elaine Fullilove Blankenship ("Mrs. Blankenship") died in Houston, Harris County, Texas. On or about November 19, 1996, Mrs. Blankenship's will was admitted to probate in Harris County, Texas. Mrs. Blankenship's will named her daughter, Anna Marie Lucas (the "Debtor"), as independent executrix and sole beneficiary. If the Debtor failed to survive her mother, Mrs. Blankenship's will named the Debtor's children ("Debtor's children" or "Respondents") as contingent beneficiaries, in equal shares. Among other bequests, Mrs. Blankenship left Debtor certain real property located in Mineral County, Colorado (the "Colorado Property").

On or about October 18, 1996, the Debtor executed a disclaimer (the "Disclaimer") pursuant to the Texas Probate Code, in which she disclaimed her interest in, *inter alia*, the Colorado Property. While the Debtor filed her Disclaimer in the Harris County probate proceedings on October 21, 1996, she did not record the Disclaimer in the real property records of Mineral County, Colorado, until January 6, 2000.

Four months after recording the Disclaimer in the Colorado real property records, the Debtor filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code. On May 11, 2000, Petitioner was appointed as Trustee (the "Trustee") of the Debtor's bankruptcy estate.

2. On May 3, 2002, the Trustee filed an adversary proceeding against the Debtor's children to set aside the Disclaimer as a fraudulent transfer under 11 U.S.C. § 548.[1] In his complaint, the Trustee alleged that the Debtor recorded the Disclaimer with actual intent to hinder, delay or defraud creditors. The Trustee also asserted that the Debtor recorded the Disclaimer without receiving a reasonably equivalent value in exchange, and (a) was insolvent when the Disclaimer was recorded or became insolvent as a result of the Disclaimer, (b) was engaged or was about to engage in a business or transaction for which her remaining property was unreasonably small capital, or (c) intended to incur or believed that she would incur, debts beyond her ability to pay as they became due.

In response, the Debtor's children filed a motion to dismiss under Fed. R. Bankr. P. 7012(b)(6), arguing that the Trustee had failed to state a claim upon which relief could

1. The bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 157(a).

be granted.[2] They argued that a disclaimer is not a transfer subject to avoidance under 11 U.S.C. § 548. The Trustee directed the bankruptcy court to this Court's holding in *Drye v. United States*, 528 U.S. 49 (1999), for determining whether a disclaimer could constitute a fraudulent transfer under federal bankruptcy law, regardless of the resolution of that issue under state law.

3. On November 5, 2002, the bankruptcy court granted Respondents' motion to dismiss. The court expressly did not reach the issue of whether, in light of *Drye*, a disclaimer can constitute a fraudulent transfer under 11 U.S.C. § 548. Instead, the court concluded, *sua sponte*, that the transfer, if any, was not subject to avoidance under the one-year requirement of section 548, because (according to the court) it was made in 1996, when the Debtor executed the Disclaimer. *See* Appendix C.[3]

4. The Trustee appealed the bankruptcy court's decision to the United States District Court for the Southern District of Texas.[4] The Trustee argued both that *Drye* applied in the bankruptcy context and that recordation of the Disclaimer, not its execution, controlled the issue of the timing of the

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2. The facts as alleged by the Trustee in his complaint were required to be taken as true for purposes of the Respondents' motion to dismiss for failure to state a claim. *Shipp v. McMahon*, 234 F.3d 907, 911 (5th Cir. 2000), *cert. denied*, 532 U.S. 1052 (2001).

3. Respondents had not moved for dismissal based on the timing of the transfer.

4. The district court had jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a), as an appeal from a final judgment or order of the bankruptcy court in a case referred to it under 28 U.S.C. § 157(a).

transfer, placing it within one year of the Debtor's bankruptcy.[5] The District Court affirmed the lower court by opinion dated November 5, 2003.

Unlike the bankruptcy court, however, the district court analyzed the applicability of *Drye* to the issue of fraudulent transfers under the Bankruptcy Code, concluding that, under *Drye*, a transfer had occurred. The court specifically held that the Debtor's control of the property – "[s]he got to decide who received the property—either her or her children" – was a valuable option resulting in a transfer of her interest to her children upon disclaimer of her right to the Colorado

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5. Under section 548(d)(1) of the Bankruptcy Code, a transfer is "made" when it is "perfected." 11 U.S.C. § 548(d)(1) (*see* Appendix D at 14a). For purposes of determining the date of a transfer under section 548, state law on the time of perfection controls. *Sandoz v. Bennett (In re Emerald Oil Co.)*, 807 F.2d 1234, 1237 (5th Cir. 1987). Colorado law is the state law to be considered in this instance because the real property at issue is located in Colorado. *See Martinez v. Gutierrez*, 66 S.W.2d 678, 681 (Tex. Comm'n App. 1933, holding approved); *Foster v. Kragh*, 107 Colo. 389, 394, 113 P.2d 666, 669 (1941); COLO. REV. STAT. ANN. 15-10-301(1)(b) (West Supp. 2003) (Appendix D at 15a). Colorado law *mandates* that disclaimers of real property be recorded in the real property records of the county where the property is located. COLO. REV. STAT. ANN. 15-11-801(2)(d) (West Supp. 2003) (Appendix D at 17a). Because of this mandate, the Disclaimer was not effective – and therefore not perfected – until it was recorded in the Colorado real property records. *See In re Griffin*, 599 P.2d 402, 406 (Okla. 1979) ("[C]ompliance with the filing requirements is a condition precedent to an *effective* disclaimer." (emphasis added)), cited with approval in *Garrett v. Vaughan (In re Vaughan)*, 261 B.R. 700, 704 (Bankr. W.D. Okla. 2001); *In re Griffin*, 812 P.2d 1256, 1258 (Mont. 1991). Accordingly, the transfer was "made," for purposes of 11 U.S.C. § 548, when the Debtor recorded the Disclaimer in the real property records in Colorado in 2000, just four months before she filed for bankruptcy.

Property. Ultimately, however, the district court agreed with the bankruptcy court that the Disclaimer was not made within a year prior to bankruptcy, and accordingly could not be avoided. *See* Appendix B.

5. The Trustee appealed the district court's opinion to the United States Court of Appeals for the Fifth Circuit.[6] Without elaboration, the Fifth Circuit affirmed the district court's judgment, concluding that the Fifth Circuit's pre-*Drye* opinion in *Simpson v. Penner (In re Simpson)*, 36 F.3d 450 (5th Cir. 1994), controlled the result in this case. *See* Appendix A. Under the Fifth Circuit's core holding in *Simpson*, a disclaimer cannot constitute a fraudulent transfer under federal law (§ 548(a) of the Bankruptcy Code) if, under state law, the beneficiary is artificially "deemed," by virtue of the relation-back doctrine, never to have possessed an interest in the property disclaimed. 36 F.3d at 452-53. According to the Fifth Circuit in *Simpson*, cases holding to the contrary "do[] not give state law its full effect." *Id.* at 453.

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6. The Fifth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 158(d), as an appeal from a final judgment or order of a district court affirming an order of a bankruptcy court pursuant to 28 U.S.C. § 158(a).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's Decision Is In Conflict With This Court's Opinion In *Drye* And Improperly Permits State Law To Alter A Federal Statute

The fundamental question before the Court is whether state law can alter a federal statute (in this case, a federal bankruptcy statute). This federal question has national importance because it implicates the rights of creditors, the proper interpretation of the federal statutes governing the administration of bankruptcy estates, and the uniformity of federal bankruptcy law throughout the United States. This Court answered this question in *Drye v. United States* with a resounding "no"—state law cannot alter a federal statute. 528 U.S. 49, 57-58 (1999). In the wake of *Drye*, which involved a federal tax lien statute, the lower courts are in conflict on this question in the bankruptcy context.[7] Unfortunately, instead of resolving the conflict and clarifying

7. *Compare In re Kloubec*, 247 B.R. 246, 256 (Bankr. N.D. Iowa 2000) (*Drye* applies in bankruptcy fraudulent transfer context because "artificially-created state doctrine [of relation back] cannot modify a substantive Federal statute."), *aff'd on other grounds*, 268 B.R. 173, 177 (N.D. Iowa 2001) ("Relying on [*Drye*], the bankruptcy court aptly pointed out that state law may not alter a federal statute."); *Floyd v. Lucas*, No. H-02-4793 (S.D. Tex. 2003) ("When [the heir] disclaimed her right to the property, she transferred her interest to her children [within the meaning of 11 U.S.C. § 548]."), *aff'd on other grounds*, No. 03-21169 (5th Cir. 2004) *with In re Nistler*, 259 B.R. 723, 726 (Bankr. D. Or. 2001) (refusing to apply *Drye* and holding that the debtor did not have "an interest in property" to fraudulently transfer because, under North Dakota law, a disclaimer treats the beneficiary as having never possessed an interest in the disclaimed property); *Cassel v. Kolb*, 267 B.R. 861, 864 (N.D. Cal. 2001) (same, analyzing California law), *aff'd on other grounds*, 326 F.3d 1030 (9th Cir. 2003); *Garrett v. Bank of Oklahoma (In re Faulk)*, 281 B.R. 15, 20-21 (Bankr. W.D. Okla. 2002) (same, analyzing Oklahoma law).

the applicability of *Drye* to federal bankruptcy statutes, the Fifth Circuit in this case ignored *Drye* and relied on its pre-*Drye* decision in *Simpson v. Penner (In re Simpson)*, 36 F.3d 450 (5th Cir. 1994), which required state law to be given "its full effect," regardless of the language of a federal statute. The Fifth Circuit's decision is in direct conflict with the principle laid down by this Court in *Drye*, unnecessarily and improperly calls into question the extent to which state law plays a part in interpreting federal statutes, and should be reversed by this Court.

Under both Texas and Colorado law, property passed under a will is deemed to vest in the beneficiary immediately upon the death of the testator. COLO. REV. STAT. ANN. § 15-12-101 (West 1997) (*see* Appendix D at 16a); TEX. PROB. CODE ANN. § 37 (Vernon 2003) (*see* Appendix D at 19a). A beneficiary, however, has nine months to disclaim any interest in the devise. COLO. REV. STAT. ANN. § 15-11-801(2)(a) (West Supp. 2003); TEX. PROB. CODE ANN. § 37A (Vernon 2003). Under the laws of both states, a valid disclaimer passes the disclaimed interest as if the disclaimant "had predeceased the decedent." COLO. REV. STAT. ANN. § 15-11-801(4)(a) (West Supp. 2003) (*see* Appendix D at 18a); TEX. PROB. CODE ANN. § 37A (Vernon 2003) (*see* Appendix D at 20a). State law further holds that the legal fiction of "relation back" treats the disclaimed interest as having never passed to the intended beneficiary. *See Dyer v. Eckols*, 808 S.W.2d 531, 533 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.).[8]

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8. Since both Colorado and Texas have similar "relation-back" and "immediate-vesting" statutes, which state law applies is important only to determine whether the Disclaimer was required to be filed in the Colorado real property records to be effective (and, therefore, "perfected" under 11 U.S.C. § 548(d)(1)). *See supra* n.5. As noted by the bankruptcy court, the parties agreed that "Colorado law controls any state law issues." *See* Appendix C at 11a.

The federal fraudulent transfer statute authorizes a bankruptcy trustee to "avoid any transfer of an interest of the debtor in property" made within one year prior to filing bankruptcy.[9] 11 U.S.C. § 548(a)(1). The issue, then, is whether the state law fiction that the debtor never had an interest in the disclaimed property controls the determination of whether the debtor had "an interest an property" for purposes of a federal statute (11 U.S.C. § 548).[10]

In 1994, the Fifth Circuit in *Simpson* concluded that state law "must be given its full effect"—if state law holds that an heir never held an interest in disclaimed property, there is no "interest in property" to fraudulently transfer under federal bankruptcy law. 36 F.3d 450, 453 (5th Cir. 1994). In other words, under *Simpson*, state law defines what an "interest in property" is within the meaning of a federal statute (11 U.S.C. § 548). Relying on *Simpson*, the Fifth Circuit reached a similar conclusion a few years later in *Leggett v. United States*, 120 F.3d 592 (5th Cir. 1997), holding that, by operation of the state law relation-back doctrine, a taxpayer never had any interest in his disclaimed inheritance to which a federal tax lien could attach. *Id.* at 596.

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9. *See supra* n.5.

10. There can be no question that, if an heir possesses an "interest in property" for purposes of section 548, a disclaimer constitutes a "transfer" that may be avoided by the trustee. A "transfer" under section 101(54) of the Bankruptcy Code includes "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of *or parting with* property or an interest in property, . . ." 11 U.S.C. § 101(54) (emphasis added); Appendix D at 15a. *See In re Brajkovic*, 151 B.R. 402, 405 (Bankr. W.D. Tex. 1993) ("The definition of transfer is so broad under the Bankruptcy Code that the execution of a disclaimer should easily fall within it."), *disapproved on other grounds*, *Simpson*, 36 F.3d at 453.

In 1999, this Court decided *Drye* and expressly rejected the Fifth Circuit's conclusion in *Leggett* that state law dictates the definition of "property" under a federal statute. 528 U.S. at 57. Under *Drye*, "the question of whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." *Id.* at 58. In a proper analysis, a court looks initially to state law to determine what rights exist, and then to federal law to determine whether such state-delineated rights qualify as "property" under federal law. *Id.* This Court accordingly concluded that, despite the state law fiction that pretends the heir never had any interest in disclaimed property, the heir's right under state law "either to inherit or to channel the inheritance to a close family member (the next lineal descendant)" qualifies as "property" for purposes of the federal statute. *Id.* at 60. The "control rein" the heir holds under state law renders the inheritance "property" belonging to him under federal law, regardless of state law's determination of that issue. *Id.* at 61 ("The control rein [Drye] held under state law, we hold, rendered the inheritance 'property' or 'rights to property' belonging to him within the meaning of [the federal statute]. . . .").

Drye thus teaches that the question of whether a state law right constitutes an interest in property is a matter of federal law when the issue involves a federal statute, and that an heir's right under state law to channel her inheritance to the next lineal descendant constitutes "property" under federal law. *Drye*, 528 U.S. at 60-61. Accordingly, as it was in *Leggett*, the Fifth Circuit's analysis in *Simpson* is wrong. "An interest of the debtor in property" for purposes of section 548 of the Bankruptcy Code is not controlled by any particular state law's characterization of a given right, but by federal law. And, as in *Drye*, the "control rein" held by the Debtor under Texas and Colorado law rendered her

inheritance "an interest in property" within the meaning of section 548 of the Bankruptcy Code.[11]

That *Drye* involved a federal tax statute and this case involves a federal bankruptcy statute should make no difference. While several post-*Drye* cases attempt to avoid the application of *Drye* by pointing to the power of the IRS, *see, e.g., In re Nistler*, 259 B.R. 723 (Bankr. D. Or. 2001), the principle at issue is the same—the state law relation-back doctrine cannot modify a substantive federal statute. Further, as with the Internal Revenue Code and the IRS, the avoidance statutes of the Bankruptcy Code confer on a trustee in bankruptcy rights and powers not otherwise available to creditors in a non-bankruptcy setting. *See In re Brajkovic*, 151 B.R. 402, 411 (Bankr. W.D. Tex. 1993) (citing 11 U.S.C. §§ 544(a)(3), 544(b), 547(b), 548(a)), *disapproved of by Simpson*, 36 F.3d at 453. Thus, to the extent the trustee has "super-creditor" status with respect to certain transfers, it was intended by Congress and should be respected by the courts.

In sum, this Court ruled in *Drye* that state law cannot be employed to redefine terms used in federal statutes. The Fifth Circuit has done just that, setting an erroneous precedent for the post-*Drye* nationwide development of the law on fraudulent transfers in the bankruptcy context. Certiorari is accordingly warranted at this time, and should be granted by the Court.[12]

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11. *See Glosband v. Watts Detective Agency, Inc.*, 21 B.R. 963, 971 (D. Mass. 1981) ("property" as used in section 548 "should be interpreted most generously.").

12. In its opinion, the Fifth Circuit based its ruling on *Simpson*, and expressed no opinion on the lower courts' holdings that the transfer, if any, did not occur within one year of the Debtor's bankruptcy. As previously explained, a transfer is not "made" for (Cont'd)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

RHONDA R. CHANDLER*
MUNSCH HARDT KOPF
& HARR, P.C.
700 Louisiana
Suite 4600
Houston, TX 77002-2732
(713) 222-1470

LADAWN H. CONWAY
MUNSCH HARDT KOPF
& HARR, P.C.
1445 Ross Avenue
Suite 4000
Dallas, TX 75202-2790
(214) 855-7500

Attorneys for Petitioner

* *Counsel of Record*

(Cont'd)
purposes of § 548(a) until it is "perfected" in accordance with controlling state law, and the Debtor's Disclaimer was not perfected until it was recorded in the real property records of Colorado. *See supra* n.5. 11 U.S.C. § 548(d)(1) (*see* Appendix D at 14a). Accordingly, both lower courts improperly ignored the requirements of the Bankruptcy Code for determining when the transfer was made and erred in their rulings on this point.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 11, 2004

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-21169

In The Matter Of: ANNA MARIE LUCAS

Debtor

BEN B. FLOYD, Trustee,

Appellant,

versus

ASHLEIGH NICOLE LUCAS; CRYSTAL ANNA LUCAS; BRANDY MARIE LUCAS; STEPHEN WADE LUCAS, JR.,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(No. H-02-CV-4793)

Before JOLLY, WIENER, and PICKERING, Circuit Judges.

PER CURIAM:*

After studying the briefs and record, we are convinced that the result in this case is controlled by our precedent in

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the *Matter of Simpson*, 36 F.3d 450 (5th Cir. 1994). We recognize that there are slight differences between the two cases, but find no meaningful basis to distinguish *Simpson*. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED NOVEMBER 4, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-02-4793

BEN B. FLOYD, TRUSTEE,

Appellant,

versus

ASHLEIGH NICOLE LUCAS, et al.,

Appellee.

Opinion on Appeal

I. *Introduction.*

A daughter disclaimed land in Colorado left her under her mother's will. Three years later, she filed for bankruptcy. Although she did not perfect the devolution of title to her children in Colorado until four months before her bankruptcy, the disclaimer was not a fraudulent transfer.

2. *Background.*

Anne-Marie Lucas's mother died in January 1996, in Harris County, Texas. Under her mother's will, Lucas got land in Colorado and part of a securities account. In October 1996, she disclaimed her interest in the land. When she

disclaimed the land, it passed to her minor children. The disclaimer was filed that month in Harris County as a part of the probate, but nothing was recorded in Colorado until January 2000, four months before she filed for bankruptcy.

The trustee argues that the disclaimer was a fraudulent transfer under federal law, claiming it was perfected within one year of Lucas' bankruptcy. 11 U.S.C. § 548. The bankruptcy court disagreed, finding that the disclaimer was effective in 1996—when Lucas filed it in Texas-three years before her bankruptcy. The trustee appeals.

3. *Transfer.*

Lucas argues that she did not transfer the land because, under Texas probate law, her disclaimer passed the property to her children as if she died before her mother. *See Simpson v. Penner*, 36 F.3d 450 (5th Cir. 1994). In effect, she argues that she never controlled it.

A close look at the transaction shows that she had at least a valuable option. When her mother died, Lucas stood to receive her land in Colorado. *See United States v. National Bank of Comm.*, 472 U.S. 713, 725 (1985). She got to decide who received the property—either her or her children. *See Drye v. United States*, 528 U.S. 49 (1999). When she disclaimed her right to the property, she transferred her interest to her children. *See* 11 U.S.C. § 101(54). Although the fiction of a disclaimer pretends that Lucas died before her mother, never giving her control of the property, that is a process of probate law not actual economic power. Whatever

the method for determining who takes following a disclaimer, the original legatee has an option to take or to allow the land to pass to the contingent beneficiary. Dodging title when you are in debt is a real economic shift to the detriment of your creditors.

4. *Effect.*

Fortunately, here the disclaimer's not being filed in Colorado until right before the bankruptcy petition does not affect the substance of her disclaimer in 1996. While the children's title was not perfected until the disclaimer was recorded in Colorado, the equitable title passed as soon as the principal probate accepted it. Parallel ancillary probate proceedings might have to be taken in another state to finish the transaction, but it was impossible in any of them to contradict her Texas disclaimer.

Under Colorado law, Lucas had to disclaim in Harris County within nine months after her rights vested. *See* Colo. Rev. Stat. Ann. § 15-11-801(2)(a). She complied, filing in October 1996. She also had to record the disclaimer in Mineral County, Colorado, where the land is, but the law does not set a deadline for that. *See* Colo. Rev. Stat. Ann. § 15-11-801(2)(d). It was not recorded until January 2000. The parties do not know why it took so long.

Despite the delay, Lucas's disclaimer was first effective in 1996, not 2000. The probate court recognized the disclaimer in 1996, giving Lucas's children the legacy and bequest, with Lucas serving as the custodian. She no longer had a personal interest in the land. The late recording may

have affected her children's rights to the land. Her duty to perfect the children's title in Colorado was probably not as an individual but as an executrix or custodian; she is a debtor as an individual. Because the disclaimer was not made within a year before her filing for bankruptcy, it cannot be avoided. *See In re Dews*, 152 B.R. 982 (D.C. Co. 1993) .

5. *Fraud.*

Not only was the transfer made outside the limitations period, there is no evidence in the record that Lucas used it to defraud her creditors. She disclaimed her right to the property four years before she filed for bankruptcy.

The disclaimer could have been dishonest in its entirely. The record even as supplemented on appeal has not shown that the debtor used the disclaimed property for her own benefit. She did not take rent from the Colorado house. She did not convert the funds in the custodian accounts to her benefit.

Although there is no evidence of deceit, Lucas's justification for disclaiming the property is disreputably false. When her mother died, Lucas says that she was getting a divorce. She says that she thought she had to disclaim the land so that her ex-husband would not get it. Secondarily, she had to ensure that her children had a place to live.

Her attorney must have told her in Texas assets she inherited from her mother would have been her property alone. Her husband would have had no right to the land unless she commingled it with marital property. *See Hilley v. Hilly*,

161 Tex. 569 (1961); Tex. Jur.3d *Family Law* § 137. This transparently false plea for sympathy fails. Using children as hostages while you dodge your debts and blaming your estranged husband for your simple failure to take care of the kids paperwork belongs on *Jerry Springer* not in a court of law.

6. *Conclusion.*

Lucas disclaimed 1996, passing the Colorado land to her four children. Her disclaimer was effective in October 1996, three years before she became bankrupt. The judgment of the bankruptcy court is affirmed that the land is not property of the estate.

Signed November 4, 2003, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-02-4793

BEN FLOYD, TRUSTEE,

Plaintiff,

versus

ASHLEIGH NICOLE LUCAS, *et al.*,

Defendants.

Order

On the defendants' motion, Lot 9, Holiday Acres Number 3, and Lot 10, Holiday Acres Number 3, as recorded in the county records of Mineral County, Colorado, along with the house on the lots is not included in the debtor's estate of Anna Marie Blankenship.

Signed November 4, 2003, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C — ORDER REGARDING MOTION TO DISMISS ADVERSARY PROCEEDING OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED NOVEMBER 5, 2002

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CASE NO. 00-34456-H5-7

ADVERSARY NO. 02-3265

IN RE:

ANNA MARIE LUCAS

DEBTOR(S)

BEN B. FLOYD, TRUSTEE

PLAINTIFF(S)

VS.

ASHLEIGH NICOLE LUCAS, ET AL.,

DEFENDANT(S)

ORDER REGARDING MOTION TO DISMISS ADVERSARY PROCEEDING

Appendix C

Before the Court is the motion to dismiss filed by Ashleigh Nicole Lucas, Crystal Anna Lucas, Brandy Marie Lucas, and Stephen Wade Lucas, Jr., for failure to state a claim for which relief can be granted under Fed.R.Bankr.P. 7012. The trustee's complaint requests this Court to avoid an alleged fraudulent transfer under 11 U.S.C. § 548.

Defendants are the minor children of debtor, Anna Marie Lucas. On January 22, 1996, debtor's mother died in Houston, Harris County, Texas. The will named debtor as independent executrix. The will was admitted to probate in Harris County in November 1996. On October 18, 1996, debtor executed a disclaimer under the Texas Probate Code, of an interest that would pass to her under the will of real property located in Mineral County, Colorado. The disclaimer was recorded in the Harris County probate proceedings on October 21, 1996. The disclaimer was recorded in the real property records of Mineral County, Colorado on January 6, 2000. Debtor filed bankruptcy on May 10, 2000. The trustee was appointed May 11, 2000.

The trustee alleges that execution and recordation of the disclaimer constitutes a fraudulent transfer under 11 U.S.C. § 548, citing *Drye v. United States*, 528 U.S. 49 (1999) as overruling existing law holding that execution of a disclaimer does not constitute a fraudulent transfer. *See Hoecker v. United Bank*, 476 F.2d 838 (10th Cir. 1973). The *Drye* Court held that Drye's "control rein" over his interest in his deceased mother's estate as to which he executed a disclaimer rendered the inheritance "property or rights to property" under 26 U.S.C. 6321 and 26 U.S.C. § 6331 (a) as to which a federal tax lien attached despite the disclaimer. *Id.* at 55-60.

Appendix C

The parties agree that as the real property lies in Colorado, Colorado law controls any state law issues. The Colorado disclaimer statute provides that a disclaimant may disclaim a present interest in property devolved under a testamentary instrument by filing not later than nine months after the death of the deceased owner, a written disclaimer in the court of the county in which proceedings for the administration of the estate of the deceased owner is pending. Colo. Rev. Stat. Ann. § 15-11-801. A copy of the disclaimer shall be delivered or mailed to any personal representative or other fiduciary of the decedent or donee of the power. Colo. Rev. Stat. Ann. § 15-11-801. If real property is disclaimed, a copy of the disclaimer shall be recorded in the office of the county clerk and recorder of the county in which the property or interest disclaimed is located. Colo. Rev. Stat. Ann. § 15-11-801. The disclaimer is binding upon the disclaimant and all persons claiming through or under that person. Colo. Rev. Stat. Ann. § 15-11-801.

The trustee assumes, but does not does not cite any supporting authority for the assertion, that the disclaimer was effective only after it was recorded in the real property records of Colorado, and that the "transfer" was made at the time the disclaimer was recorded. Under 11 U.S.C. § 548, the trustee may avoid only those transfers made on or within one year before the date of the petition. For purposes of determining when a transfer is made, 1 I U.S.C. § 548(d)(1) provides that a transfer which is subject to perfection, has been perfected as against bona fide purchasers from the debtor. The trustee has not cited any authority that establishes that a disclaimer under Colorado law is subject to perfection by recordation. The Court concludes that the "transfer," if the disclaimer is

to be construed as such, occurred when it was executed and filed with the probate court in October 1996. Thus, the Court does not reach the issue of whether the holding of *Drye v. United States*, 528 U.S. 49 (1999), overturns established law holding disclaimers are not fraudulent transfers.

Based on the foregoing, the Court GRANTS defendants' motion to dismiss.

Signed this 5 day of Nov., 2002 at Houston, Texas.

s/ Karen K. Brown
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — RELEVANT STATUTES AND CODES

11 U.S.C. § 548(a)(1)

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

> **(A)** made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> **(B)(i)** received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> **(ii)(I)** was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(d)(1)

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

Appendix D

11 U.S.C. § 101(54)

§ 101. Definitions

In this title—

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

Colo. Rev. Stat. § 15-10-301(1)(b)

§ 15-10-301. Territorial application

(1) Except as otherwise provided in this code, this code applies to:

(b) The property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state;

Appendix D

Colo. Rev. Stat. § 15-12-101

§ 15-12-101. Devolution of estate at death; restrictions

The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of the testate estate or, in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to exempt property and family allowances, rights of creditors, elective share of the surviving spouse, and administration.

Colo. Rev. Stat. § 15-11-801(1)

§ 15-11-801. Disclaimer of property interests

(1) **Right to disclaim interest in property.** A person, or the representative of a person, to whom an interest in or with respect to property or an interest therein devolves by whatever means may disclaim it in whole or in part by delivering

or filing a written disclaimer under this section. The right to disclaim exists notwithstanding (i) any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction or (ii) any restriction or limitation on the right to disclaim contained in the governing instrument. For purposes of this subsection (1), the "representative of a person" includes a personal representative of a decedent, a conservator of a protected person, an agent acting on behalf of that person within the express authority of a power of attorney, and any other fiduciary acting on behalf of the person.

Colo. Rev. Stat. § 15-11-801(2)(d)

(2) **Time of disclaimer.** The following rules govern the time when a disclaimer shall be filed or delivered:

> (d) If real property or an interest therein is disclaimed, a copy of the disclaimer shall be recorded in the office of the county clerk and recorder of the county in which the property or interest disclaimed is located.

Appendix D

Colo. Rev. Stat. § 15-11-801(4)(a)

(4) **Effect of disclaimer.** The effects of a disclaimer are:

(a) If property or an interest therein devolves to a disclaimant under a testamentary instrument, under a power of appointment exercised by a testamentary instrument, or under the laws of intestacy, and the decedent has not provided for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the decedent, but if by law or under the testamentary instrument the descendants of the disclaimant would share in the disclaimed interest per capita at each generation or otherwise were the disclaimant to predecease the decedent, then the disclaimed interest passes per capita at each generation or passes as directed by the governing instrument to the descendants of the disclaimant who survive the decedent. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had predeceased the decedent. A disclaimer relates back for all purposes to the date of death of the decedent.

Appendix D

Tex. Prob. Code § 37

§ 37. Passage of Title Upon Intestacy and Under a Will

When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law, and subject to the payment of court-ordered child support payments that are delinquent on the date of the person's death; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exception aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate and the delinquent child support payments; but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law.

Appendix D

Tex. Prob. Code § 37A

§ 37A. Means of Evidencing Disclaimer or Renunciation of Property or Interest Receivable From a Decedent

Any person, or the guardian of an incapacitated person, the personal representative of a deceased person, or the guardian ad litem of an unborn or unascertained person, with prior court approval of the court having, or which would have, jurisdiction over such guardian, personal representative, or guardian ad litem, or any independent executor of a deceased person, without prior court approval, who may be entitled to receive any property as a beneficiary and who intends to effect disclaimer irrevocably on or after September 1, 1977, of the whole or any part of such property shall evidence same as herein provided. A disclaimer evidenced as provided herein shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant. Unless the decedent's will provides otherwise, the property subject to the disclaimer shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent and a future interest that would otherwise take effect in possession or enjoyment after the termination of the estate or interest that is disclaimed takes effect as if the disclaiming beneficiary had predeceased the decedent.

* * *